

SERVED: January 5, 1996

NTSB Order No. EA-4413

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of December, 1995

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|----------------------------------|---|---------------------|
| RAYMOND FRANCIS GRZYBOWSKI, |) | |
| |) | |
| Applicant, |) | |
| |) | Docket |
| v. |) | |
| |) | 191RM-EAJA-SE-13322 |
| DAVID R. HINSON, |) | |
| Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

OPINION AND ORDER

The Administrator appeals from the May 9, 1995 decision and order, on remand, of Chief Administrative Law Judge William E. Fowler, granting applicant's Equal Access to Justice Act (EAJA) application for partial attorney's fees and expenses.¹ For the reasons discussed below, the appeal will be denied.

An overview of the proceedings leading to this appeal is appropriate. On September 26, 1993, applicant's wife was struck

¹A copy of the initial decision is attached.

and killed by the propeller of applicant's single-engine aircraft when she attempted to remove the nosewheel chocks in preparation for a flight with the applicant, who did not shut down the engine before she exited the aircraft. In response to the incident, the Administrator sought an emergency revocation of applicant's commercial pilot certificate on the ground that he had carelessly or recklessly endangered his wife, in violation of FAR 91.13(a).

While the law judge affirmed the Administrator's order of revocation, the Board, on appeal, determined that revocation was inappropriate and reduced applicant's sanction to a 60-day suspension.

Applicant subsequently filed the instant EAJA application "limited to recovery of fees and costs incurred in defending against the Administrator's position that revocation was the appropriate sanction[.]" Application at 1. Applicant's EAJA application, states, in part, that

[a] total of 70 hours was billed for attorney time in defending this case. Counsel for Mr. Grzybowski has reviewed his billing records for the months of October and November 1993. Based on the detail of those billings, a good faith estimate has been made that two-thirds of the time spent on this case during the appeals and hearing stage related to the issue of sanction and the Administrator's allegations that he lacked qualification.

Application, Exhibit B, at 8.² The law judge denied the application, concluding that while the applicant was the

²Applicant's EAJA application sought \$5,152, which included 52.5 hours of billed attorney time (29.5 hours at \$100 per hour and 23 hours at \$90 per hour), \$90 for "Lexis research of cases involving the issue of sanction" and \$42 for a "prorata portion of travel, telephone and meals expense."

prevailing party on the issue of sanction, the Administrator was substantially justified in seeking revocation of applicant's pilot certificate.³ On appeal by applicant, we reversed the law judge's determination that the Administrator had been substantially justified in his choice of sanction, finding that

in a case where the airman had already suffered intensely and uniquely from a mistake that has not been shown to reflect, and does not appear to implicate, a broad or general inability to exercise airman privileges with requisite care, judgment and responsibility, the Administrator pursued a sanction for which he cites no close precedent and offers essentially no argument that his enforcement responsibilities would not have been adequately discharged by an order less severe than revocation.

Grzybowski v. Hinson, NTSB Order No. EA-4301 at 6 (1994).

Accordingly, we remanded the case to the law judge for "an assessment of EAJA fees and costs fairly attributable to the Administrator's unjustified pursuit of an excessive and unwarranted sanction." Id. at 7. On remand, the law judge granted applicant's EAJA application in its entirety.⁴

³We should emphasize here, as we did in Administrator v. Gilfoil, NTSB Order No. EA-3982 (1993), that a reduction in sanction standing alone will not ordinarily support an EAJA award. The departure from that principle here occurs because (1) the Administrator did not appeal the determination that applicant was a prevailing party on the issue of sanction, and (2) the nature of the alleged violation was without clear precedent, such that requiring the applicant to have litigated only sanction would have precluded a determination on whether a cognizable offense had been pleaded.

⁴On remand, applicant supplemented his application with a claim for an additional \$1,500 in fees incurred as a result of the appeal. The entire application, thus totaling \$6,652, was approved by the administrative law judge.

On appeal from the law judge's order on remand, the Administrator contests both the adequacy of the documentation of the applicant's EAJA application and the law judge's acceptance of the applicant's attorney's estimate of the proportion of his fees and expenses related to the sanction issue. We are not persuaded that the law judge's decision should be overturned for either objection.

By law, an EAJA application must include "an itemized statement from an attorney ... stating the actual time expended and the rate at which fees and other expenses were computed." 5 U.S.C. 504(a)(2). In addition, our own regulations state, in pertinent part, that

[t]he application shall be accompanied by full documentation of the fees and expenses.... showing the hours spent in connection with the proceeding ... , a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant.

49 C.F.R. 826.23. While the applicant's EAJA application clearly complies with 5 U.S.C. 504(a)(2), the Administrator argues that under our regulation it should have been more detailed as to the actual work his attorney performed during the hours listed. While we agree that the application does not comply with the literal requirement of the regulation, we do not think its deficiency in this regard warrants its rejection in this case.

The application includes a statement from applicant's attorney setting forth the number of hours he believes he spent defending against the issue of sanction and the hourly rate

charged. In addition, it sets forth the specific expenses for which reimbursement is sought. What the application does not include is "a description of the specific services performed" by the attorney.⁵ We would not hesitate to reject an application for insufficient information if it appeared to seek fees for a number of hours of attorney services that was clearly disproportionate to the complexity of the matter or that could not be substantially verified by an examination of the case file.

In this connection, however, we note that the applicant's attorney, inter alia, conducted research and prepared pleadings, with associated correspondence, for appealing from the Administrator's emergency revocation order and for the appeal to the full Board from the adverse decision the law judge issued at the conclusion of the one-day evidentiary hearing, he engaged in discovery in advance of the hearing, and he represented the applicant at that hearing. The record contains, in short, ample indication of the legal services the applicant's attorney performed in the 52.5 hours for which the applicant seeks reimbursement. The lack of specific documentation in applicant's application is not, therefore, so material to our review of it as to dictate its disapproval on that ground. Compare Administrator v. Sottile, 4 NTSB 1217, 1221 (1984)(accepting EAJA application notwithstanding nonmaterial deviations from specificity

⁵This deficiency presumably would have been corrected if applicant's attorney had included in the application the actual details of the monthly billings he referenced in the exhibit to the application.

requirement).

The Administrator's attack on the applicant's "good-faith estimate" that two-thirds of his total fees and expenses were attributable to the issue of revocation fares no better. We do not agree with the Administrator's apparent view that it is always possible to differentiate or separate with precision expenses incurred as a result of defending against an alleged violation from those expenses incurred as a result of defending against the sanction proposed for the asserted violation. This is especially true in a case challenging an airman's qualifications, for the defense of each individual charge, as well as the overall defense strategy, must, to some degree at each stage of the proceeding, be tied to an effort to establish, in the face of a complaint alleging otherwise, that the airman can be trusted to comply with regulations or act with appropriate judgment.

In these circumstances, we do not believe that the applicant's assessment, endorsed by the law judge, that two-thirds of his costs derived from the Administrator's pursuit of this matter as an incident requiring revocation should be secondguessed simply because neither sanction nor applicant's qualifications were actually mentioned or discussed on two-thirds of the pages of the transcript. The issue is not how much of the transcript is expressly devoted to the matter of sanction, but how much of the applicant's defense, viewed as a whole, is fairly attributable to his attempt to show that he was qualified to

retain his certificate.⁶ The Administrator has not shown the applicant's estimate to be unreasonable.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;
2. The decision of the law judge is affirmed; and
3. Applicant is entitled to an award of attorney's fees and expenses in the amount of \$7,077.⁷

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.

⁶That the applicant did not seek to recover all of his expenses suggests, we think, that he likely would have appealed even a suspension order based on a claim that he had breached FAR section 91.13(a). Nevertheless, the applicant before the hearing submitted a memorandum of law which made clear his position that, even if the regulatory charge were upheld, the Administrator was not justified in seeking a revocation of his pilot certificate.

⁷In addition to the \$6,652 awarded by the law judge, applicant asserts that he has incurred an additional \$425 in expenses as a result of having to respond to the Administrator's appeal from the law judge's decision on his application on remand. We think this additional amount is also recoverable, which raises the applicant's total EAJA award to \$7,077.